INDEX

	Page
Petition	1-7
Question presented:	
IS A MERCHANT OF THE CHINESE RACE ENTITLED TO ADMISSION TO THE UNITED STATES UNDER SECTION 6 OF THE CHINESE EXCLUSION ACT OF MAY 6, 1882, AS AMENDED BY THE ACT OF JULY 5, 1884, UPON A CERTIFICATE IN THE FORM REQUIRED BY THAT SECTION, ISSUED BY A COUNTRY OF WHICH HE IS A RESIDENT BUT TO WHICH HE DOES NOT OWE PERMANENT AND GENERAL ALLEGIANCE? MORE SPECIFICALLY, THE QUESTION IS AS TO THE MEANING OF THE WORD "SUBJECT" AS USED IN SECTION 6	1
The statute	2
Statement	2
Specification of error to be urged	4
Reasons for granting the petition	5
Brief in support of petition	8-23
Opinions of the courts below	8
Jurisdiction	8
Statement of facts	8
Treaty and statutes involved	8
Argument:	
I. The wording of sections 6 and 15 of the act of July 5, 1884, and the purpose of Congress support the construction that "subject" as used in section 6 means a Chinese owing permanent allegiance to a foreign government	13
II. Great weight should be given the construction by the executive departments charged with the execution of the Chinese exclusion laws, requiring that the Chinese Government or its duly authorized representative must issue section 6 certificates to Chinese citizens resident in foreign countries	16
III. The proper administration of the immigration act of 1924 requires section 6 certificate to be issued by government to which Chinese owes permanent allegiance	21
Conclusion	23

AUTHORITIES CITED

	Page
Cases:	
McLaren v. *Fleischer*, 256 U. S. 477	16
Textbooks:	
Dicey, Conflict of Laws, 2d ed., p. 104	15
Webster's New International Dictionary	14
Other authorities:	
Consular Instruction, April 15, 1905 (MS. Circular Instructions to Diplomatic and Consular Officers, vol. 6)	19
Foreign Relations, 1904, p. 117	18
Richardson's Messages, vol. 8, p. 360	16
20 Op. A. G. 668	18
21 Op. A. G. 347	18
22 Op. A. G. 201	18
Rules governing admission of Chinese, May 1, 1917, rule 10	20
Treaties and statutes:	
Treaty between United States and China, Nov. 17, 1880 (22 Stat. 826), Art. II	8, 22
Convention between United States and China, March 17, 1894 (28 Stat. 1210), Art. III	18
Chinese exclusion act of May 6, 1882 (22 Stat. 58), as amended by the act of July 5, 1884 (23 Stat. 115), and continued in force indefinitely by the acts of April 29, 1902 (32 Stat. 176), and April 27, 1904 (33 Stat. 394, 428)	
Section 1	9
Section 6	2, 9, 13
Section 14	11, 21
Section 15	11, 15
Immigration act of May 26, 1924 (chap. 190, 43 Stat. 153)	
Section 3	12, 21
Section 13	12, 21
Section 23	12
Section 28	13
Section 240 (a) of the Judicial Code, as amended by act of February 13, 1925 (43 Stat. 936)	8

In the Supreme Court of the United States

OCTOBER TERM, 1926

Nos. ——

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the port of San Francisco, petitioner

v.

LOI HOA

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the port of San Francisco, petitioner

v.

LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of John D. Nagle, Commissioner of Immigration at the Port of San Francisco, prays that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit entered on June 1, 1926.

QUESTION PRESENTED

I

Is a merchant of the Chinese race entitled to admission to the United States under Section 6 of the Chinese Exclusion Act of May 6, 1882, as

amended by the Act of July 5, 1884, upon a certificate in the form required by that section, issued by a country of which he is a resident but to which he does not owe permanent and general allegiance? More specifically, the question is as to the meaning of the word "subject" as used in Section 6.

THE STATUTE

The Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by the Act of July 5, 1884 (c. 220, 23 Stat. 115), provides:

> SEC. 6. That in order to the faithful execution of the provisions of this Act, every Chinese person, other than a laborer, who may be entitled by said Treaty or this Act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a *subject*. * * * (Italics ours.)

STATEMENT

The respondent, Loi Hoa, a Chinese person, upon applying at San Francisco, California, on October 31, 1925, for admission as a merchant, testified that he was born in Chew On Village, Suning District of China, August 23, 1899, and that since 1919 he has lived at Cholon, a city in French Indo-China, where his occupation has been that of a merchant of a named company. While concededly a citizen

and subject of China, the only certificate which he presented from a foreign government granting him permission, and identifying him as entitled, to come to the United States was one issued by the Chief of the Immigration Service of the Government of French Indo-China. (R. 5; Original Immigration Record, mentioned R. 10.)

The respondent, Phuong Con, a Chinese person, upon applying at San Francisco, California, on November 18, 1925, for admission as a merchant, testified that he was born in the Sar Gai Hong Village, H. P. D., China, October 21, 1894; that he is a citizen or subject of China; that he had never renounced his allegiance to China in any manner and that he had never become a citizen or subject of any country other than China. He further testified that he was a merchant in his home village from 1913 until 1915, when he went to Tai Yuen City, Indo-China, where he was a merchant until 1924, when he returned to his home in Sar Gai Hong Village in China and followed no occupation but was awaiting a decision of the American authorities with reference to permission to come to the United States as a Section 6 merchant. The only certificate which he presented from a foreign government granting him permission, and identifying him as entitled to come to the United States was one issued by "Le Chef du Service de l'Immigration et du Controle de la Maind'oeuvre agricole," of the Government of French Indo-China. (R. 3; Original Immigration Record, mentioned R. 10.)

The official in each case who issued the certificate had been designated by the French Government to issue such certificates to Chinese persons being citizens or subjects of French Indo-China, but had not been designated by the Chinese Government to issue certificates of this nature to its citizens or subjects. It is not claimed by the Government that there is in French Indo-China any Chinese official or other official, authorized by the Chinese Government, to issue such certificates. Each certificate bore the usual certificate of investigation and visa of the American Consul at Saigon, French Indo-China. Each Chinese was excluded on the sole ground that he had not submitted a Section 6 certificate issued by the government to which he owes allegiance and of which he is a citizen or subject. (Original Immigration Record, mentioned R. 10.)

In habeas corpus proceedings in each case the District Court sustained the demurrer to the petition. (R. 10.) On appeal, the cases were consolidated by the Circuit Court of Appeals for the Ninth Circuit, and the judgment of the District Court reversed and remanded with instructions to issue the writs of habeas corpus as prayed for, on the ground that the Chinese being residents of French Indo-China were subjects thereof within the meaning of the Chinese Exclusion Law. (R. 21, *Loi Hoa case.*)

SPECIFICATION OF ERROR TO BE URGED

The error which the petitioner urges as ground for the granting of the writ of certiorari and for

the reversal of the decision of the Circuit Court of Appeals for the Ninth Circuit is:

1. The court erred in holding that merchants of the Chinese race, citizens and subjects of the Republic of China, are entitled to enter the United States under authority of certificates issued in regular form in compliance with Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended by the Chinese Exclusion Act of July 5, 1884, by an official of French Indo-China, where the Chinese merchants had been domiciled for a number of years, and not issued by a duly authorized official or representative of the Republic of China.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals has misconstrued the meaning of the laguage "by the Chinese Government or of such other foreign government of which at the time such Chinese person shall be a subject" in Section 6 of the Chinese Exclusion Act of May 6, 1882 (22 Stat. 58), as amended by the Act of July 5, 1884 (23 Stat. 115).

2. The court's construction overrules the settled practice of the Department of Labor and the Department of State as to what government Section 6 Certificates are to be obtained from by Chinese of the classes exempt from exclusion.

3. The case is one of importance in the administration of the Chinese Exclusion Acts and the Immigration Act of 1924 (43 Stat. 153) for the reason that the admissibility of most Chinese aliens under

the last named Act depends upon whether they are entitled both by treaty and the Chinese Exclusion Laws to come to the United States. In the case of a Chinese alien claiming a right to enter the United States on these grounds, it is important that his status be certified to by the country which is a party to the treaty and of which he is a subject or citizen.

4. Under the decision of the Circuit Court of Appeals it will be possible for a Chinese person who is a subject of China to obtain admission under the treaty between the United States and China and the Immigration Act of 1924, although his Section 6 certificate be not issued by the Government of China, but only by some other country of which he is a resident. That possibility would be an inducement for Chinese aliens to claim to be citizens of the country which is a party to the treaty providing for the admission of certain classes, and to present Section 6 certificates from another country in which they reside. Such other country not being under any treaty obligation, its officials will not have the concern to investigate and verify with care the nationality of such persons or their status, and if it is later discovered by this country that the alien was not of the status claimed or not a subject of the country which was a party to the treaty, there will be no basis under a treaty for a complaint to either the country which issued the certificate or to that of which he claimed to be a subject. The way would be open to defeat the laws by the use of cer-

tificates whose purpose the statute declares to be to aid in the faithful execution of the laws.

5. The question involved in this case is one of Federal law which has not been, but should be, settled by this Court.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

AUGUST, 1926.

7697—26——2

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below have not been reported. However, the orders of the District Court sustaining demurrers to petitions for writs of habeas corpus and denying writs, without opinion, will be found on page 10 of the Transcripts of Record and the opinion of the Circuit Court of Appeals for the Ninth Circuit on page 21 of the Record in the *Loi Hoa case.*

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on June 1, 1926.

No question of jurisdiction was raised in the courts below.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, ch. 229).

STATEMENT OF FACTS

The facts have been stated above in the petition (pp. 2–4) to which reference is made.

TREATY AND STATUTES INVOLVED

Article II of the Treaty between the United States and China of November 17, 1880 (22 Stat. 826), provides:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

The Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by the Act of July 5, 1884 (c. 220, 23 Stat. 115), and continued in force indefinitely by the Acts of April 29, 1902 (c. 641, 32 Stat. 176), and of April 27, 1904 (c. 1630, 33 Stat. 394, 428), Section 1 and Section 14, and part of Section 6 and Section 15, as amended, the matter inserted in amended Sections 6 and 15 being italicized, and the matter stricken out being in parentheses, read as follows:

> Sec. 1. That from and after the passage of this Act, * * * the coming of Chinese laborers be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come, to remain within the United States.
>
> Sec. 6. That in order to the faithful execution of (articles one and two of the Treaty in) *the provisions of* this Act (before mentioned), every Chinese person, other than a laborer, who may be entitled by said Treaty (and) *or* this Act to come within the United

States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese government, *or of such other foreign government of which at the time such Chinese person shall be a subject,* in each case (such identity) to be evidenced by a certificate issued (under the authority of said) *by such* government, which certificate shall be in the English language (or if not in the English language accompanied by a translation into English, stating such right to come) *and shall show such permission, with the name of the permitted person in his or her proper signature,* and which certificate shall state the *individual, family, and tribal* name *in full,* title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued,* and place of residence (in China) of the person to whom the certificate is issued, and that such person is entitled (conformably to the Treaty in) *by* this Act (mentioned) to come within the United States. * * * *The certificate provided for in this Act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visaed by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart;*

and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.

Such certificate visaed as aforesaid shall be prima facie evidence of the fact set forth therein, and shall be produced to the collector of customs (or his deputy) of the port in the district in the United States at which the person named therein shall arrive, *and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed.

Sec. 15. That *the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers," wherever used in this act, shall be

construed to mean both skilled and unskilled laborers and Chinese employed in mining.

Section 3 of the Immigration Act of 1924 (Chap. 190, 43 Stat. 153) provides:

> When used in this Act the term "immigrant" means any alien departing from any place outside of the United States destined for the United States, except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Section 13 of the Immigration Act of 1924 provides:

> (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3.

Section 25 of the Immigration Act of 1924 provides:

> The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws * * *. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien although admissible under the provisions of the immigration laws other than this Act, shall not be

admitted to the United States if he is excluded by any provision of this Act.

Section 28 of the Immigration Act of 1924 provides:

> (c) The term "ineligible to citizenship," when used with reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 14 of the Act entitled "An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882.
>
> (g) The term "immigration laws" includes * * * this Act, and all laws, conventions, and treaties, of the United States relating to the immigration, exclusion, or expulsion of aliens; * * *.

ARGUMENT

I

THE WORDING OF SECTIONS 6 AND 15 OF THE ACT OF JULY 5, 1884, AND THE PURPOSE OF CONGRESS SUPPORT THE CONSTRUCTION THAT "SUBJECT" AS USED IN SECTION 6 MEANS A CHINESE OWING PERMANENT ALLEGIANCE TO A FOREIGN GOVERNMENT

This case turns upon the meaning of the word "subject" as used in Section 6 of the Act of July 5, 1884, namely, "* * * every Chinese person, other than a laborer, who may be entitled by said Treaty or this act to come within the United States * * * shall obtain the permission of and be identified as so entitled by the Chinese government,

or of such other foreign government of which at the time such Chinese person shall be a *subject*, in each case to be evidenced by a certificate issued by such government * * *." (Italics ours.) It is the contention of the Government that the word "subject" as used in Section 6 means a person of Chinese descent who owes permanent allegiance to "such other foreign government" by virtue of birth or naturalization therein; and, therefore, a person of Chinese descent who owes permanent allegiance to the Chinese government but who merely resides within the jurisdiction of and owes temporary allegiance to "such other foreign government" is not a "subject" of the latter within the meaning of the statute.

Webster's New International Dictionary defines the word "subject" as follows:

> Specifically, one who is subject to a monarch or ruler and is governed by his law; in a wider sense, one who lives in the territory of, and enjoys the protection of, and owes allegiance to, a sovereign power or state. Primarily and accurately speaking "subject" is used only to denote one who by birth, or now by naturalization, owes allegiance to a monarch or conquering state; but the term is loosely used, esp. in international law, to designate also a citizen of any other form of sovereign state, as of the United States, and even, in a still wider sense, a citizen of a commonwealth constituting a member of a sovereign state.

Dicey in "Conflict of Laws" (2d Ed.), pp. 164, says:

> The term "British subject" means any person who owes permanent allegiance to the Crown. "Permanent" allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within British dominions, owes "temporary" allegiance to the Crown.

Section 15 of the Act of July 5, 1884, provides:

> That the provisions of this act shall apply to all *subjects of China* and *Chinese*, whether *subjects of China* or *any other foreign government*. * * * (Italics ours.)

Here Congress clearly distinguishes between "subjects of China" and "Chinese * * * subjects of any other foreign government." In other words, the Chinese Exclusion Laws may not be defeated because one of that race is a citizen of and owes permanent allegiance to a foreign government other than China. It was also intended that subjects of China of the exempt classes should not enjoy greater privileges than exempt persons of Chinese descent who were citizens of other foreign governments. It is, therefore, a fair inference to assume that in Section 6 Congress intended the same distinction, namely, between subjects of China and subjects or citizens of Chinese descent of other foreign governments.

The obvious purpose of the Chinese Exclusion Acts was to exclude from the United States all

Chinese except certain exempt classes. In effecting this purpose, Congress no doubt considered that the government to which the privileged Chinese owed permanent allegiance would exercise greater care in issuing the requisite documents indicating his exempt status than the government of the country in which he merely resided and which might not be familiar with the data required.

II

GREAT WEIGHT SHOULD BE GIVEN THE CONSTRUCTION BY THE EXECUTIVE DEPARTMENTS CHARGED WITH THE EXECUTION OF THE CHINESE EXCLUSION LAWS, REQUIRING THAT THE CHINESE GOVERNMENT OR ITS DULY AUTHORIZED REPRESENTATIVE MUST ISSUE SECTION 6 CERTIFICATES TO CHINESE CITIZENS RESIDENT IN FOREIGN COUNTRIES.

The practical construction given to an Act of Congress, fairly susceptible of different constructions, by executive departments charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. *McLaren* v. *Fleischer*, 256 U. S. 477, and cases cited at p. 481.

President Cleveland, in a special message to Congress on April 6, 1886 (8 Richardson's Messages, 390), calls attention to what he designates as an anomalous feature of Section 6 of the Act of July 5, 1884, in not providing for the issuance of certificates "to Chinese persons who, retaining their Chinese subjection in some countries other than China

desire to come from such countries to the United States." He continues:

> Chinese merchants have trading operations of magnitude throughout the world. They do not become citizens or subjects of the country where they may temporarily reside and trade; they continue to be subjects of China, and to them the explicit exemption of the treaty applies. Yet if such a Chinese subject, the head of a mercantile house at Hongkong or Yokohama or Honolulu or Havana or Colon, desires to come from any of these places to the United States, he is met with the requirement that he must produce a certificate, in prescribed form and in the English tongue, issued by the Chinese Government. If there be at the foreign place of his residence no representative of the Chinese Government competent to issue a certificate in the prescribed form, he can obtain none, and is, under the provisions of the present law, unjustly debarred from entry into the United States. His usual Chinese passport will not suffice, for it is not in the form which the act prescribes shall be the sole permissible evidence of his right to land. And he can obtain no such certificate from the Government of his place of residence, because he is not a *subject or citizen thereof "at the time," or at any time.* (Italics ours.)

This feature of Section 6 apparently has been remedied to a certain extent by the designation by the Chinese Government of representatives in certain foreign countries who are authorized to issue

cate only from the government of which he owes his allegiance.

As heretofore pointed out, the number of persons authorized to issue such certificates to Chinese resident in foreign countries who do not owe permanent allegiance to such countries, have been increased subsequently by the designation by the Chinese Government of consular and other officers to act in that capacity.

The Secretary of Labor for a long period of years has adopted also the construction that a Chinese person, owing permanent allegiance to the Government of China but who is resident in a foreign country, must obtain a Section 6 certificate from a duly authorized representative of the Chinese Government as distinguished from the government of the foreign country in which he resides.

Rule 10, Rules governing the Admission of Chinese, promulgated by the Secretary of Labor, May 1, 1917, provides:

> The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese subjects or citizens of such Governments the certificates prescribed by Section 6 of the Act approved July 5, 1884.

Then follows a list of countries alphabetically arranged with the title of the official or officials in each designated for the purpose. For example:

Canada:
Ottawa—Chief or Assistant Controller of Chinese Immigration.
China:
In Chinese Republic—
Canton, Civil Governor.
In countries foreign to China—
Canada, Chinese Consul General, Ottawa.

Manifestly, it was contemplated by such rule that the Chinese Consul General is to issue the Section 6 certificates to Chinese subjects in Canada of the exempt classes coming to the United States and that the Chief or Assistant Controller of Chinese Immigration is to issue such certificates to British subjects of Chinese descent of the exempt classes coming to the United States.

III

THE PROPER ADMINISTRATION OF THE IMMIGRATION ACT OF 1924 REQUIRES SECTION 6 CERTIFICATE TO BE ISSUED BY GOVERNMENT TO WHICH CHINESE OWES PERMANENT ALLEGIANCE

Chinese aliens of the exempt classes, to one of which the respondents herein belong, are ineligible to citizenship in the United States. Section 14, Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by Act of July 5, 1884 (c. 220, 23 Stat. 115). Section 13 (c) of the Immigration Act of May 26, 1924 (c. 190, 43 Stat. 153), provides that no alien ineligible to citizenship shall be admitted to the United